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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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ALBERT HAYES,

Plaintiff,

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v.

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J.E. TILTON,

Defendant.

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Civil No. 07cv533 AJB(WVG)

**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION; DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING A CERTIFICATE OF APPEALABILITY; DENYING PETITIONER'S MOTION FOR RULING ON PENDING OBJECTION PLEADING; DENYING PETITIONER'S MOTION TO APPOINT COUNSEL AND/OR DISCOVERY PROCESS**

[Dkt. Nos. 70, 73.]

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Petitioner Albert Hayes (“Petitioner”), a state prisoner proceeding *pro se* and *in forma pauperis*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(b)(1), Magistrate Judge Leo. S. Papas submitted a report and recommendation (“Report”) recommending that the petition be denied in its entirety. Petitioner filed objections to the report and recommendation on June 1, 2009. The case was transferred to the undersigned judge on March 25, 2011. After a thorough review of the issues, the documents presented, and objections filed, the Court ADOPTS the Magistrate Judge’s report and recommendation denying the petition for writ of habeas corpus. The Court also DENIES a certificate of appealability and DENIES Petitioner’s motion for ruling on pending objection pleading as MOOT. Lastly, the Court DENIES Petitioner’s motion to appoint counsel and/or discovery process as MOOT.

## Background

2 On December 4, 2003, Petitioner represented himself at trial and was convicted by jury of  
3 one count of forcible rape in violation of California Penal Code (“Penal Code”) section 261(a)(2);  
4 one count of assault with intent to commit rape in violation of Penal Code section 220; and one  
5 count of assault by means likely to produce great bodily injury in violation of Penal Code section  
6 245(a)(1). (Notice of Suppl. Lodgment 1 at 623-24, 626.) The jury also found true all prior  
7 conviction allegations. (*Id.* at 632-38.)

8 On March 15, 2004, Petitioner, represented by counsel at this time, filed a motion for a new  
9 trial based on a claim that the prosecution failed to make timely disclosure of notes of a police  
10 detective which were favorable to the defense. (*Id.* at 472-80.) On March 29, 2004, the trial court  
11 denied the motion. (*Id.* at 642.) The trial court sentenced Petitioner to state prison for twenty-five  
12 years and enhanced his sentence by fifteen years for his three prior serious felony convictions. (*Id.*  
13 at 653.)

14 Petitioner appealed his conviction to both the California Court of Appeal and the California  
15 Supreme Court. (Lodgments 1, 4.) Both of his appeals were denied on December 29, 2005 and  
16 April 12, 2006, respectively. (Lodgments 3, 5.) Petitioner then filed a petition for writ of habeas  
17 corpus in the California Court of Appeal on April 17, 2005, which was denied on May 18, 2005.  
18 (Suppl. Lodgments 5, 6.) He filed a petition for writ of habeas corpus in the California Supreme  
19 Court on June 13, 2005 which was denied on May 10, 2006. (Suppl. Lodgments 7, 8.) Petitioner  
20 filed another petition for writ of habeas corpus in the court of appeal on May 12, 2006. (Lodgment  
21 9.) That petition was denied on July 7, 2006. (Lodgment 10.) He then filed a petition for writ of  
22 habeas corpus in the California Supreme Court on July 19, 2006. (Lodgment 11.) The California  
23 Supreme Court denied the petition on February 7, 2007. (Lodgment 12.)

24 On March 21, 2007, Petitioner filed the instant petition for writ of habeas corpus in this  
25 Court. (Dkt. No. 1.) On June 25, 2007, Respondent filed an answer. (Dkt. No. 25.) Petitioner filed  
26 a traverse on April 10, 2008. (Dkt. No. 42.) On April 10, 2008, the Magistrate Judge issued a  
27 report and recommendation denying the petition for writ of habeas corpus. (Dkt. No. 41.) Petitioner  
28 filed his objections to the Report on June 1, 2009. (Dkt. No. 65.) On March 25, 2011, the case was

1 transferred to the undersigned judge. (Dkt. No. 71.) On May 10, 2011, Petitioner filed a motion for  
 2 ruling on pending objections. (Dkt. No. 73.)

3 In his petition, he alleges three claims: (1) a violation of his due process rights for the  
 4 prosecution's untimely disclosure of evidence; (2) a violation of his due process rights for the denial  
 5 of participation in appellate review; and (3) ineffective assistance of counsel on appeal.

6 **Factual Background**

7 The following factual background is taken from the Court of Appeal opinion in People v.  
 8 Hayes, unpublished opinion (Cal. Ct. App., 4th Dist., Div. 1, December 29, 2005). The Court  
 9 presumes these factual determinations are correct pursuant to 28 U.S.C. § 2254(e)(1).

10 Patricia, a resident of Bell Hotel in downtown San Diego, testified that  
 11 about 8:30 p.m. on March 21, 2003,<sup>1</sup> she was outside the hotel talking to a  
 12 White male (Robert Rohena) and a Black male. Patricia had met Rohena  
 13 before, but she had not previously met the other man. During the  
 14 conversation, Patricia learned that the men had been roommates in room  
 15 four of the Bell Hotel, but the Black male had just moved out of the hotel  
 16 that day. After talking for about five to 10 minutes with the two men,  
 17 Patricia walked down the street with the intention of panhandling for  
 18 money to buy beer.

19 When she was about a block away from the hotel, she saw the Black male  
 20 again and he asked her if she wanted to smoke some "crack." Patricia  
 21 walked with him for about a block, but because she started "getting some  
 22 really bad vibes from him," she told him she did not "want to do that with  
 23 [him]." When they reached the corner of a fence near a freeway ramp, she  
 24 started "feeling really like [she] was in danger." She wanted to leave the  
 25 area, but the man grabbed her hand and told her to sit down. They started  
 26 arguing, and when she refused to sit down he pulled her down by the arm  
 27 and slammed her to the ground. She asked, "What the hell is going on?"  
 He told her to "[s]hut the hell up." She was resisting him, and he hit her  
 on the face with something hard that felt like a brick or a rock. She felt  
 that she had better do what he said or he would "do something more" to  
 hurt her.

28 Patricia asked if she could at least sit on a mattress that was leaning  
 29 against the fence. The man pulled the mattress down to the ground and let  
 her sit on it. He told her to pull down her pants. She complied, and the  
 30 man had sexual intercourse with her. At one point during the rape, she  
 31 saw someone standing by a fence on the other side of the street. She  
 32 started screaming to get the person's attention. Her assailant told her to  
 33 shut up and choked her until she "blacked out for a bit" and stopped  
 34 yelling. After the man finished and stood up, Patricia pretended like  
 35 nothing had happened because she "wanted to live." As they walked back  
 36 down the street, the man stated, "You sure you don't want me to give you  
 37 any money? I'll give you \$100." Patricia responded, "I don't want your

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<sup>1</sup>Subsequent references to dates are to the year 2003.

damn money." Prior to the rape, they had not discussed exchanging money for sex, and she did not smoke rock cocaine with him or acquire the drug from him.

The man left the area and Patricia returned to the Bell Hotel. As she walked back to the hotel, she had blood in her mouth and could feel her face swelling up. After Patricia arrived at her room and told her boyfriend what had happened, she and her boyfriend went to a hotel manager Diedre Grant's office. Patricia told Grant that she thought the person who attacked her was "that Black guy" who had just moved out of room number four. Grant showed Patricia a copy of Hayes's picture on his transit card, and Patricia stated that he was her attacker. Grant called 911.

Grant testified that about 10:30 or 11:00 p.m. on March 21, Patricia and her boyfriend came to the manager's apartment. Patricia was a "bloody mess." She was bleeding from her nose and mouth, and her face was swollen and distorted. She was crying and hysterical and told Grant she had been raped by the "Black man in room four."

After reporting the rape, Patricia was transported by ambulance to the hospital. The examining nurse testified that Patricia had "massive facial trauma," consisting of abrasions and bruising on the entire left side of her face; a laceration on the left side of her tongue consistent with having been hit in the face with a hard object such as a brick; and a vaginal laceration consistent with nonconsensual intercourse.

DNA testing revealed a match between Hayes's DNA and semen found in Patricia's vagina.

### *Hayes's Defense*

Testifying on his own behalf, Hayes stated that on March 21, he was moving out of the Bell Hotel to the Center City Hotel because the Bell Hotel was plagued by drug users. Hayes testified he did not use drugs, and that he worked for an organization called Christ Missionary that solicited funds to assist the homeless and other individuals in need. At about 3:30 p.m. on March 21, Hayes left the Bell Hotel and went to a phone booth to call his sisters to ask them to come help transport his possessions to his new hotel room. After making the phone calls, at around 4:00 p.m. Hayes was walking back to the Bell Hotel when he saw Rohena walking up the street and Patricia coming out of the hotel.

Hayes, Rohena, and Patricia all arrived at the corner of 15<sup>th</sup> and K Streets by the Bell Hotel. Rohena had been Hayes's roommate in room four of the Bell Hotel. Hayes spoke with Rohena, telling him that he was moving out of the Bell Hotel. Patricia briefly participated in the conversation. All of a sudden Patricia, who smelled strongly of alcohol, started asking for money. Rohena promptly walked away into the Bell Hotel, and Hayes angrily told Patricia to get away from him and to clean herself up and get a job. Hayes testified that Patricia abused drugs and alcohol, panhandled for money, and was out all hours of the night. When Hayes told Patricia to get away from him, she walked away and went to a nearby liquor store.

After Hayes's sisters and some friends helped him move to the Center City Hotel, Hayes returned to the Bell Hotel at around 7:00 p.m. to retrieve some property he had forgotten in his room. Between 7:00 and

1           7:30 p.m., he was standing outside the Bell Hotel talking to Rohena. He  
 2 saw Patricia come around the corner from the other side of the hotel,  
 3 where she was talking to other people, including a “black guy.” Patricia  
 4 came and spoke to Rohena. She then went and smoked rock cocaine with  
 5 a “Black guy” who was a drug dealer and whose name was A.C., or A.P.,  
 6 or William. This was the last time Hayes saw Patricia on the night of  
 7 March 21. Hayes testified that he never touched or hit Patricia, and he did  
 8 not have sex with her.  
 9

10           After finishing his conversation with Rohena at around 7:30 p.m., Hayes  
 11 left the area and took the trolley back to the Center City Hotel. He stayed  
 12 in his room about 10 to 20 minutes, and then went to his sister’s residence  
 13 at another downtown hotel near First and Broadway, and stayed there  
 14 about five or 10 minutes. Next, he took the bus and trolley to Chula Vista,  
 15 arriving at the Christ Missionary shelter at about 8:00 p.m. From Chula  
 16 Vista, he was transported in a van to northern San Diego county to solicit  
 17 funds for the charity. He worked from about 8:30 p.m. until about 9:15  
 18 p.m., and arrived back at the Christ Missionary shelter at around 9:40 p.m.  
 19 He then took the trolley and bus and returned to his sister’s home at about  
 20 10:00 p.m. He ate dinner at his sister’s home and stayed there the rest of  
 21 the night.  
 22

23           Hayes called several witnesses, including his sister and work colleague, to  
 24 corroborate his alibi defense and to confirm that the Bell Hotel was in an  
 25 area rampant with prostitution and illegal drug usage.  
 26

27           (Lodgment 3 at 2-6.)

## 15           Discussion

### 16           A.     Scope of Review of Magistrate Judge’s Report and Recommendation

17           The district court “shall make a *de novo* determination of those portions of the report . . . to  
 18 which objection is made,” and “may accept, reject, or modify, in whole or in part, the findings or  
 19 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b). A  
 20 district court may adopt those parts of a Magistrate Judge’s report to which no specific objection is  
 21 made, provided they are not clearly erroneous. Thomas v. Arn, 474 U.S. 140, 152-53 (1985).

### 22           B.     Scope of Review of Federal Habeas Petition Pursuant to 28 U.S.C. § 2254

23           28 U.S.C. § 2254(a) provides:

24           The Supreme Court, a Justice thereof, a circuit judge, or a district court shall  
 25 entertain an application for a writ of habeas corpus in behalf of a person in  
 26 custody pursuant to the judgment of a State court only on the ground that he is in  
 27 custody in violation of the Constitution or laws or treaties of the United States.

28           28 U.S.C. § 2254(a). As amended, the AEDPA now reads:

29           (d) An application for a writ of habeas corpus on behalf of a person in custody  
 30 pursuant to the judgment of a State court shall not be granted with respect to any  
 31

1 claim that was adjudicated on the merits in State court proceedings unless the  
 2 adjudication of the claim--

3 (1) resulted in a decision that was contrary to, or involved an unreasonable  
 4 application of, clearly established Federal law, as determined by the Supreme Court  
 of the United States; or  
 (2) resulted in a decision that was based on an unreasonable determination of the  
 facts in light of the evidence presented in State court proceeding.

5 28 U.S.C. § 2254(d) (emphasis added).

6 To obtain federal habeas relief, Petitioner must satisfy either § 2254(d)(1) or § 2254(d)(2).

7 See Williams v. Taylor, 529 U.S. 362, 403 (2000). The threshold question is whether the rule of law  
 8 was clearly established at the time petitioner's state court conviction became final. Id. at 406.

9 Clearly established federal law, as determined by the Supreme Court of the United States "refers to  
 10 the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-  
 11 court decision." Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 71 (2003). However, Ninth  
 12 Circuit case law may be "persuasive authority for purposes of determining whether a particular state  
 13 court decision is an 'unreasonable application' of Supreme Court law, and also may help us  
 14 determine what law is 'clearly established.'" Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir.  
 15 2000). Only after the clearly established Federal law is identified can the court determine whether  
 16 the state court's application of that law "resulted in a decision that was contrary to, or involved an  
 17 unreasonable application of" that clearly established Federal law. See Lockyer, 538 U.S. at 71-72.

18 A state court decision is "contrary to our clearly established precedent if the state court  
 19 applies a rule that contradicts the governing law set forth in our cases" or "if the state court  
 20 confronts a set of facts that are materially indistinguishable from a decision of this Court and  
 21 nevertheless arrives at a result different from our precedent." Williams, 529 U.S. at 405-406. "A  
 22 state-court decision involves an unreasonable application of this Court's precedent if the state court  
 23 identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the  
 24 facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal  
 25 principle from our precedent to a new context where it should not apply or unreasonably refuses to  
 26 extend that principle to a new context where it should apply." Id. at 407. Under Williams, an  
 27 application of federal law is unreasonable only if it is "objectively unreasonable." Id. at 409.  
 28 Further, a state court's decision results in a "decision that was based on an unreasonable

1 determination of the facts in light of the evidence presented in State court proceeding” if it “is so  
 2 clearly incorrect that it would not be debatable among reasonable jurists.” Jeffries v. Wood, 114  
 3 F.3d 1484, 1500 (9th Cir. 1997) (citations omitted).

4 In making such a determination under AEDPA, the court looks to the state’s last reasoned  
 5 decision. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). Where there is no reasoned decision  
 6 from the state’s highest court, the Court “looks through” to the underlying appellate court decision.  
 7 Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991). A state court need not cite Supreme Court  
 8 precedent when resolving a habeas corpus claim. Early v. Packer, 537 U.S. 3, 8 (2002). “[S]o long  
 9 as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court  
 10 precedent,]” id., the state court decision will not be “contrary to” clearly established federal law.

11 When a federal habeas court is faced with reviewing a state court denial for which there is no  
 12 reasoned decision, however, the deferential standard under § 2254(d) cannot be applied because  
 13 there is “nothing to which we can defer.” Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. 2002).  
 14 Under such circumstances, “[f]ederal habeas review is not *de novo* . . . but an independent review of  
 15 the record is required to determine whether the state court clearly erred in its application of  
 16 controlling federal law.” Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

17 It is only when a state court could not reach the merits of a claim (e.g. because a procedural  
 18 bar prevented it) that “AEDPA’s standard of review does not apply.” Killian v. Poole, 282 F.3d  
 19 1204, 1208 (9th Cir. 2002). In such cases, when it is clear that the “[state] courts did not reach the  
 20 merits of [the petitioner’s constitutional] claim, federal habeas review is not subject to the deferential  
 21 standard that applies under AEDPA to ‘any claim that was adjudicated on the merits in State court  
 22 proceedings’”; “[i]nstead, the claim is reviewed *de novo*.” Cone v. Bell, — U.S. —, 129 S. Ct.  
 23 1769, 1784 (2009) (quoting 28 U.S.C. § 2254(d)); see also Pirtle v. Morgan, 313 F.3d 1160, 1167  
 24 (9th Cir. 2002).

25 **C. Claim One: Untimely Disclosure of Evidence**

26 In the petition, Petitioner claims that the late disclosure of police notes violated his due  
 27 process rights. The first piece of evidence was discovered during the prosecutor’s case-in-chief  
 28 which was a note by Officer John Serrano that stated, “I was there. It was consensual.” (Report at

1 13.) The second piece of evidence was also within Officer Serrano's notes which stated "I didn't  
 2 report on time." (Id. at 18.)

3 In the Report, the Magistrate Judge concluded that the claim of the untimely disclosure of  
 4 evidence was not entitled to habeas relief. Petitioner objects to the Magistrate Judge's findings and  
 5 contends that the Magistrate Judge erred by relying on the trial and appellate courts findings and that  
 6 both courts failed to weigh the prejudice to him as well as failing to consider his alternatives at trial.  
 7 (Pet'r Obj. at 4.) Petitioner asserts that the Magistrate Judge should have concluded that the trial  
 8 court should have *sua sponte* granted a mistrial with Petitioner's permission, or in the alternative,  
 9 consulted with Petitioner regarding the proper course of action. (Id.) As to the second piece of  
 10 evidence, Petitioner argues that the Magistrate Judge erred by adopting the appellate court's findings  
 11 that the victim was subject to recall. (Id.) Petitioner also argues that the information was necessary  
 12 to prepare his defense and if he had been given the evidence prior to trial he would have prepared his  
 13 defense differently. (Id. at 8.)

14 Under Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that  
 15 the "suppression by the prosecution of evidence favorable to an accused upon request violates due  
 16 process where the evidence is material either to guilt or to punishment, irrespective of the good faith  
 17 or bad faith of the prosecution." Id. at 87. In order to show a Brady violation, first, the evidence  
 18 must be favorable to the accused because it is either exculpatory or impeachment material. Strickler  
 19 v. Greene, 527 U.S. 263, 280 (1999). Second, the evidence must have been either willfully or  
 20 inadvertently suppressed by the State and third, there must be prejudice from the failure to disclose  
 21 the evidence. Id. at 281-82. In a case of the late disclosure of favorable evidence, the court looks at  
 22 whether the evidence was revealed in time for the defendant to make use of it. Bielanski v. County  
 23 of Kane, 550 F.3d 632, 645 (7th Cir. 2008) (Brady evidence can be handed over on the eve of trial or  
 24 even during trial so long as the defendant is able to use it to his or her advantage.); United States v.  
 25 Warren, 454 F.3d 752, 760 (7th Cir. 2006).

26 On September 29, 2003, at a pretrial discovery proceeding, the court stated that Petitioner  
 27 was entitled to police notes. (RT at 271-72.) At the time, the prosecution stated that he and his  
 28 assistant checked with Officer Serrano about raw notes, and Serrano stated he did not have any

1 notes. (Id.) At the proceeding, the trial court directed the prosecution to contact all police officers  
 2 involved in the case to inquire whether any notes existed. (Id. at 273)

3 At trial, during the prosecution's case-in-chief when the defendant was cross-examining  
 4 Officer Serrano, it was revealed that he possessed some original notes of his interview with the  
 5 victim, Patricia H. (RT at 1158.) One of the entries in the note taken on March 26, 2003, stated "I  
 6 was there - It was consensual." (CT at 493; RT at 1188.) The notes were provided to Petitioner and  
 7 the court granted his request for a five-minute recess in order to examine them. (RT at 1160-61.)  
 8 After having reviewed the notes, Petitioner wanted to proceed and used the notes to cross-examine  
 9 Serrano. (RT at 1167-69; 1217-18.) Serrano testified that he thought the note consisted of a list of  
 10 questions, he wanted to ask about the case but could not specifically remember about the statement  
 11 at issue. (Id.) He testified that he only interviewed the hotel manager and the victim. (Id.) He did  
 12 not think the statement at issue referred to anything specific that anybody told him and he did not  
 13 know where he got that statement from. (Id.)

14 The issue as correctly determined by the Magistrate Judge is whether there was prejudice  
 15 from the failure to disclose the evidence. The court of appeal agreed that a discovery violation  
 16 occurred but concluded that a new trial was not warranted because if the consent note had been  
 17 disclosed prior to trial, there was no reasonable probability the outcome of the trial would have been  
 18 different. (Lodgment 3 at 9-10.) The court of appeal held that the "late disclosure of these items did  
 19 not diminish Hayes's opportunity to develop and present the jury with a consent defense or  
 20 otherwise interfere with his ability to control selection of his defense strategy." (Id. at 2.) The court  
 21 of appeal provided a detailed explanation as to why the late disclosure of the note was not  
 22 prejudicial and why the defendant was not precluded from bringing up alternative theories for his  
 23 defense. (Id. at 13.) The court explained that when the existence of the note was revealed,  
 24 Petitioner had not presented his opening statement to the jury, had not himself testified and had not  
 25 called his alibi witnesses. (Id. at 13-15.) Therefore, Petitioner had the option to either present a  
 26 consent defense or move for a mistrial. (Id. at 16.) However, the defendant did not take advantage  
 27 of either option. (Id. at 17.)

28 As to the second note, which stated, "I didn't Report on time," (Pet. at 7-a.), the Magistrate

1 Judge found the claim had not been exhausted because his appellate counsel refused to raise the  
 2 issue and he was not allowed to file a supplemental appeal with the appellate court. (Report at 19.)  
 3 Petitioner claims the note creates an inference of a lapse of time that could have raised doubt as to  
 4 the victim's story. (Pet. at 5-c to 6-c.) Analyzing the claim on its merits, the Magistrate Judge  
 5 found the late disclosure did not result in any prejudice to Petitioner. (Id.) The evidence could have  
 6 been used to impeach the victim's testimony. (Id.) Petitioner had laid the foundation to challenge  
 7 her credibility and he had already cast doubt upon her credibility. (Id.) Therefore, at the time of  
 8 discovery of the note, Petitioner had the opportunity, by recalling the victim, to use the note for  
 9 impeachment purposes and its use would have been consistent with testimony he had already  
 10 presented to the jury. (Id.)

11 Once the disclosure of the notes was revealed, Petitioner had the opportunity to move for a  
 12 mistrial or use the evidence later in the trial by recalling the victim to impeach her further or by  
 13 bringing up a consent defense. However, he failed to do so. Petitioner's contentions that the court  
 14 should have *sua sponte* granted a mistrial or discussed the option with Petitioner, does not find  
 15 support in case law, and therefore, Petitioner was not prejudiced by the late disclosure. See  
 16 Strickler, 527 U.S. at 281.

17 Accordingly, the state court's decision was not "contrary to, or involved an unreasonable  
 18 application of, clearly established Federal law." See 28 U.S.C. § 2254(d)(1). The Court ADOPTS  
 19 the Magistrate Judge's findings and conclusions that Petitioner is not entitled to habeas relief on the  
 20 claim of the late disclosure of police notes.

21 **D. Claim Two: Denial of Appellate Review Process**

22 Petitioner claims he was denied the "fundamental liberty interest to participate in the [sic]  
 23 gain access to appellate review process." (Pet. at 16.) He argues that while his case went through  
 24 the state appeals process, his appellate counsel declined to raise multiple issues. (Id. at 16-22.)  
 25 Since appellate counsel failed to raise issue on appeal, Petitioner filed a motion for leave to file a *pro  
 26 se* supplemental opening brief in the court of appeal. (Suppl. Lodgment 3.) The court of appeal  
 27 denied his motion because he does not have a right to self-representation in criminal appeals.  
 28 (Suppl. Lodgment 4). The Magistrate Judge concluded that Petitioner was not entitled to habeas

1 relief because there is no “right to self-representation in criminal appeal” and appellate counsel does  
 2 not have to make every frivolous argument.” (Report at 20 (citing Jones v. Barnes, 463 U.S. 745,  
 3 751-53 (1983)).

4 Since Petitioner did not file objections as to this claim, and the Magistrate Judge’s analysis  
 5 was not clearly erroneous, the Court ADOPTS the Magistrate Judge’s findings and conclusion that  
 6 Petitioner is not entitled to habeas relief as to his second claim for denial of the appellate review  
 7 process.

8 **E. Claim Three: Ineffective Assistance of Counsel on Appeal**

9 In the petition, Petitioner argues that he received ineffective assistance of counsel when his  
 10 appellate counsel failed to raise certain issues on appeal. According to Petitioner, appellate counsel  
 11 failed to present the following allegations on appeal: 1) failed to challenge the denial of his motion  
 12 to dismiss the information on the ground that he was denied advisory counsel and a language  
 13 interpreter at the preliminary hearing when he was representing himself; 2) failed to challenge the  
 14 trial court’s exclusion of third party culpability evidence; 3) failed to challenge the shoddy police  
 15 investigation of the crime; 4) failed to adequately challenge the ruling regarding the disclosure of a  
 16 witness address; and 5) failed to conduct an investigation on newly discovered evidence regarding  
 17 Dixon in support of a habeas petition or to assist in filing such a petition. (Pet. at 8, 2c-21c.)

18 In the Report, the Magistrate Judge concluded that the claim of ineffective assistance of  
 19 counsel was procedurally defaulted. Petitioner objects to the Magistrate Judge’s conclusion arguing  
 20 that the claim of ineffective assistance of counsel was not procedurally defaulted.

21 The procedural default doctrine forecloses review of a state prisoner’s federal habeas claims,  
 22 if those claims were defaulted in a state court pursuant to an independent and adequate state  
 23 procedural rule. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). For a state procedural rule to  
 24 be “independent,” the state law basis for the decision must not be interwoven with federal law.  
 25 Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); Harris v. Reed, 489 U.S. 255, 265 (1989). In  
 26 order for a state procedural rule to be “adequate,” it “must have been ‘firmly established and  
 27 regularly followed’ by the time as of which it is to be applied.” Ford v. Georgia, 498 U.S. 411, 424  
 28 (1991) (quoting James v. Kentucky, 466 U.S. 341, 348 (1984)). This means that the question is

1 whether the state courts were regularly and consistently applying the relevant procedural default rule  
 2 “at the time the claim should have been raised.” Fields v. Calderon, 125 F.3d 757, 760 (9th Cir.  
 3 1997).

4 A state procedural bar rule is inadequate to preclude federal habeas review if the state rule is  
 5 not consistently applied. Lambright v. Stewart, 241 F.3d 1201, 1203 (9th Cir. 2001). “In all cases  
 6 in which a state prisoner has defaulted his federal claims in state court pursuant to an independent  
 7 and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner  
 8 can demonstrate cause for the default and actual prejudice as a result of the alleged violation of  
 9 federal law, or demonstrate that failure to consider the claims will result in a fundamental  
 10 miscarriage of justice.” Coleman, 501 U.S. at 750.

11 On February 7, 2007, the California Supreme Court denied Petitioner’s habeas petition with  
 12 citations to In re Clark, 5 Cal. 4th 750 (1993); and In re Miller, 17 Cal. 2d 734 (1941). (Lodgment  
 13 No. 12.) Respondent argues that the California Supreme Court’s references to In re Clark and In re  
 14 Miller represent the invocation of an independent and adequate state procedural bar. However, the  
 15 Court has the discretion to decide the case on the merits without reaching any procedural default  
 16 issues. See Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (holding that a district court may  
 17 address the merits without reaching procedural issues where the interests of judicial economy are  
 18 best served by doing so); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (“Procedural bar  
 19 issues are not infrequently more complex than the merits issues presented by the appeal, so it may  
 20 well make sense in some instances to proceed to the merits if the result will be the same.”). After a  
 21 review of the extensive nineteen page discussion on procedural default in the Report, the Court  
 22 exercises its discretion to decide Petitioner’s claims on the merits without reaching any procedural  
 23 default issues. (See Report at 21-40.)

24 The California Supreme Court denied the petition on February 7, 2007. (Lodgment 12.)  
 25 Since there is no reasoned decision from the California Supreme Court, the Court “looks through” to  
 26 the court of appeal decision. See Ylst, 501 U.S. 801-06. On July 7, 2006, the court of appeal denied  
 27 the petition explaining that the claim was not first brought in the superior court. (Lodgment 10.)  
 28 Since the court of appeal did not reach the merits of the claim, this Court’s review of the case is *de*

1 *novo*. See Pirtle, 313 F.3d at 1167.

2 The clearly established United States Supreme Court law governing ineffective assistance of  
 3 counsel claims is set forth in Strickland v. Washington, 466 U.S. 668 (1984). Baylor v. Estelle, 94  
 4 F.3d 1321, 1323 (9th Cir. 1996) (stating that Strickland “has long been clearly established federal  
 5 law determined by the Supreme Court of the United States”); Jones v. Wood, 114 F.3d 1002, 1013  
 6 (9th Cir. 1997). A habeas petitioner must satisfy two requirements to demonstrate his assistance of  
 7 counsel was so defective that habeas relief is warranted. First, the petitioner must show that  
 8 counsel’s performance was deficient. Strickland, 466 U.S. at 687. “This requires showing that  
 9 counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the  
 10 defendant by the Sixth Amendment.” Id. Second, the petitioner must show counsel’s deficient  
 11 performance prejudiced the defense. Id. The test for prejudice requires that the defendant show that  
 12 there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome would  
 13 have been different. Id. at 694. In other words, petitioner must demonstrate his counsel’s error  
 14 rendered the result unreliable or the trial fundamentally unfair. Fretwell v. Lockhart, 506 U.S. 364,  
 15 372 (1993); Strickland, 466 U.S. at 694. Review of counsel’s performance is “highly deferential”  
 16 and there is a “strong presumption” that counsel rendered adequate assistance and exercised  
 17 reasonable professional judgment.” United States v. Ferreira-Alameda, 815 F.2d 1251, 1253 (9th  
 18 Cir. 1987); see Strickland, 466 U.S. at 690. The question is not what defense counsel could have  
 19 pursued but rather whether the choices made were reasonable. Babbitt v. Calderon, 151 F.3d 1170,  
 20 1173 (9th Cir. 1998). “Failure to make the required showing of either deficient performance or  
 21 sufficient prejudice defeats the ineffectiveness claim.” Strickland, 466 U.S. at 700.

22 “Counsel has a duty to make reasonable investigations or to make a reasonable decision that  
 23 makes particular investigations unnecessary.” Strickland, 466 U.S. at 691. He must “at a minimum  
 24 conduct a reasonable investigation enabling him to make informed decisions about how to best  
 25 represent his client.” Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). “To determine the  
 26 reasonableness of a decision not to investigate, the court must apply ‘a heavy measure of deference  
 27 to counsel’s judgments.’” Babbitt, 151 F.3d at 1173.

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## **1. Failure to Appeal Denial of Motion to Dismiss the Information Based on Denial of Auxiliary Aids at the Preliminary Hearing**

5 Petitioner argues that his appellate counsel failed to challenge the trial court's ruling denying  
6 his motion to dismiss the information because Petitioner was denied auxiliary assistance in the form  
7 of an advisory counsel and oral interpreter at the preliminary hearing.<sup>2</sup> (Pet. at 2-c.)

8 Petitioner has a speech and hearing impediment. (RT at 19, 25, 165.) His hearing loss  
9 requires him to use hearing aids. (RT, vol. 2 at 168.) His hearing causes his speech impediment in  
10 the form of a hearing-impaired accent which brings forth an issue of understanding Petitioner. (RT  
11 at 26.) At the preliminary hearing, Petitioner utilized an assistive listening device.<sup>3</sup> (RT, vol. 2 at  
12 168.) The trial court at the preliminary hearing was sensitive to the needs of Petitioner. The court  
13 denied Petitioner's request for an advisory counsel because an advisory counsel would not assist in  
14 areas of hearing or speaking impairments. (RT at 20; 25.) The court suggested possibly an oral  
15 interpreter and had Petitioner's impairments evaluated to accommodate Petitioner prior to being  
16 arraigned. (Id. at 21-22; 164.) The court also commented that there were only a few things that  
17 were difficult to understand and that the court felt "pretty comfortable" understanding him. (Id. at  
18 25-26.) The court would ask him to repeat if the court did not understand him. (Id.) The trial judge  
19 also commented on being comfortable with the procedures used at the hearing and court's ability to  
20 accommodate those needs at the hearing. (RT at 164.) The court delayed the arraignment in order  
21 for appropriate accommodations for his impairments to be put in place for Petitioner. (Id.)

22 On September 12, 2003, another trial judge held a hearing on Petitioner's nonstatutory 995  
23 motion to set aside the preliminary examination for failure to provide advisory counsel and an  
24 American Sign Language ("ASL") interpreter. (RT, vol. 2 at 167.) The court provided a very

<sup>2</sup> The Court notes that at the preliminary hearing, he only requested advisory counsel. (RT at 1-167.)

<sup>3</sup> An assistive listening device amplifies sound for the hearing impaired. Dobard v. San Francisco Bay Area Rapid Transit Dist., 1993 WL 372256 (N.D. Cal. 1993).

1 detailed and thoughtful ruling on the motion. (Id. at 173-181.) The trial judge not only reviewed the  
 2 preliminary hearing transcript but other hearings. (Id. at 173.) The issue was whether Petitioner  
 3 was denied an ASL interpreter, and second, whether he was denied an advisory counsel. (Id. at  
 4 174.)

5 At the preliminary hearing, Petitioner had the use of an assistive listening device. (Id. at  
 6 168.) At subsequent proceedings, based on the judge's recommendation, Petitioner was provided  
 7 with an assistive listening device, the CART<sup>4</sup> process, an ASL interpreter<sup>5</sup> and hearing aids. (Id. at  
 8 168.) At the preliminary hearing, Petitioner fully participated and the communication was going  
 9 well. (Id. at 179.) As to the advisory counsel, the trial court concluded that advisory counsel was  
 10 not appropriate for health related issues and it is not the role of the advisory counsel to step in as  
 11 counsel during the times when Petitioner has a problem. (Id. at 180.) In addition, the court  
 12 concluded that Petitioner was "conversant with legal concepts, and he knows how to tenaciously go  
 13 about putting his point across." (Id. at 180.) The court also mentioned that she did not pick up an  
 14 impediment "other than what I am used to hearing from folks who have a hearing loss." (Id. at 177.)  
 15 She understood him "more clearly than any number of people who have been in my courtroom  
 16 without hearing impairments. . . ." (Id.)

17 The record shows that Petitioner was engaged and participated fully in the preliminary  
 18 hearing, the trial judge was able to understand him and if there were issues of understanding, words  
 19 or sentences would be repeated. (RT, vol. 2 at 173-80.) Petitioner was also afforded the opportunity  
 20 to request that words be repeated. (Id.) However, the times when requests were made to repeat  
 21 words by the Court and by Petitioner were few. (Id. at 176.)

22 In addition there is no constitutional right to advisory counsel. Locks v. Sumner, 703 F.2d  
 23 403, 407-08 (9th Cir. 1983). Petitioner is a vigorous advocate and was able to articulate issues and  
 24 present his defense well at trial. Accordingly, the trial court's denial of his request for advisory

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 4 The CART process involves a screen that the defendant can read what is being said  
 during the proceedings. (RT, vol. 2 at 167.)

5 The ASL interpreter was used as a back up. When the Court could not understand what  
 Petitioner was saying, the interpreter would say it instead. (RT, vol. 2 at 171-72.)

1 counsel did not violate any constitutional rights.

2 After a review of the proceedings in state court, the Court concludes that appellate's counsel  
 3 failure to challenge the trial court's ruling denying his request to dismiss the information for failure  
 4 to provide for advisory counsel and an oral interpreter at the preliminary hearing was reasonable.  
 5 See Babbitt, 151 F.3d at 1173. After a *de novo* review, the Court concludes that Petitioner is not  
 6 entitled to habeas relief as to this claim.

7 **2. Failure to Challenge Exclusion of Third Party Culpability Evidence and Failure  
 8 to Challenge Trial Court's Ruling on the Consent Note**

9 Petitioner claims that his appellate counsel should have challenged the trial court's exclusion  
 10 of third party culpability evidence regarding the victim's boyfriend's history of abuse toward the  
 11 victim at a hearing on November 12, 2003. (Pet. at 6-c.) The Magistrate Judge recommended that  
 12 this claim be denied. In the objections, Petitioner argues that he was not challenging the trial court's  
 13 ruling at the hearing on November 12, 2003 but the trial court's exclusion of the victim boyfriend's  
 14 history of abuse from Officer Serrano's testimony on November 28, 2003. (Obj. at 22.) He  
 15 contends that the victim's boyfriend had a history of physically abusing the victim and had a motive  
 16 for assaulting the victim. (Id.)

17 At the hearing on November 12, 2003, Petitioner brought forth a motion to allow the  
 18 testimony of the victim's boyfriend concerning his abuse of the victim. (RT at 771.) The trial court  
 19 questioned Petitioner whether he sought to question the victim about the abuse of her boyfriend or to  
 20 allow the testimony of the boyfriend. (Id. at 772.) Petitioner indicated that he wanted to reserve the  
 21 motion until trial because he was not sure whether he would seek the testimony of the boyfriend.  
 22 (Id. at 773.) The trial court did not rule on Petitioner's motion but warned Petitioner that a hearing  
 23 would need to be held on the issue and he would need to provide at least a half-day's notice if he  
 24 planned to call the victim's boyfriend on the stand. (Id. at 773.) As to whether he could ask the  
 25 victim about her boyfriend, the trial court told Petitioner that if the issue was not dealt with at that  
 26 hearing, he will not be able to ask the victim about her boyfriend. (Id. at 774.) Petitioner did not  
 27 object to the decision. (Id.) The trial court later restated, "unless I have ruled it's admissible, you're  
 28 not allowed to. Do you understand?" (Id. at 776.)

1       At trial, Petitioner sought to question Officer Serrano about the victim's boyfriend being an  
 2 "aggressive pimp and pandering individual." (RT at 1273.) The trial court sustained the  
 3 prosecutor's objections and stated, "Mr. Hayes, you're going to need to stop because we've already  
 4 discussed this, I've already ruled on it." (*Id.*) Petitioner argues that he is entitled to elicit proof that  
 5 another person committed the assault and the history of the victim's boyfriend's physical abuse  
 6 provided such evidence.

7       A review of the record shows that Petitioner failed to comply with the court rules/decision on  
 8 presenting evidence regarding the history of abuse by the victim's boyfriend. Therefore, it was  
 9 reasonable for appellate counsel to not challenge the trial court's ruling excluding testimony  
 10 regarding the victim's boyfriend's history of abuse. See Babbitt, 151 F.3d at 1173.

11       Petitioner also argues that appellate counsel failed to challenge the late disclosure of the  
 12 police note which stated, "I didn't report on time." (Pet. at 5c; Pet, Ex. K-1.) He argues that this  
 13 statement creates an inference of a lapse of time that raises questions as to the victim's story. (*Id.* at  
 14 5-c to 6-c.) As discussed earlier, the Court concluded that at the time of discovery of the note,  
 15 Petitioner could have recalled the victim to impeach her credibility or use the note as rebuttal  
 16 evidence. Therefore, there was no prejudice to the late disclosure of the police note. Appellate's  
 17 counsel failure to raise this issue on appeal was reasonable. See Babbitt, 151 F.3d at 1173.  
 18 Accordingly, Petitioner is not entitled to habeas relief on this claim.

### 19       3.       **Failure to Challenge the Adequacy of Police Investigation of the Crimes**

20       Petitioner argues that he requested his appellate counsel to raise the issue of the shoddy  
 21 investigation of the case by Detective Serrano. (Pet. at 9-c.) Specifically, he states that Officer  
 22 Serrano only recorded and preserved the victim's and her fabricated witness statements. He further  
 23 used those statements to improperly bring up Petitioner's past criminal record which had no  
 24 relevance in this case. (*Id.*) He claims that Officer Serrano failed to preserve the name of the person  
 25 who made the comment "I was there. It was consensual"; he failed to investigate and obtain  
 26 evidence at the scene of the alleged crime; failed to pursue the victim's boyfriend as a perpetrator  
 27 since he had a history of being violent towards the victim; failed to interview witnesses; and failed to  
 28 preserve or procure information about the "unknown contacted person's name, identity." (*Id.* at 9-c

1 to10-c.)

2       In response to Petitioner's request to add more issues on appeal, appellate counsel wrote a  
 3 letter dated November 18, 2004 explaining that even though the police may have been sloppy and  
 4 made inadequate efforts to investigate the case, and to locate the person whom the victim said she  
 5 thought she saw nearby, the standard is not that the police must make extraordinary efforts to  
 6 investigate the case. (Id., Ex, E.) Moreover, without a description or additional information about  
 7 this potential witness to the alleged crime, it would not be realistic for the police to locate such a  
 8 witness. (Id.)

9       Petitioner does not provide authority that the police has a duty to investigate the crimes more  
 10 thoroughly than they did. It was reasonable for appellate counsel to decline to bring this issue on  
 11 appeal. See Babbitt, 151 F.3d at 1173. Accordingly, the Court concludes that Petitioner is not  
 12 entitled to habeas relief as to this issue.

13       **4. Failure to Challenge the Ruling Regarding the Disclosure of a Witness Address**

14       Petitioner argues that appellate counsel failed to raise the issue of the prosecutor's  
 15 concealment of a favorable non-confidential address of witness Rohena, who was Petitioner's  
 16 roommate and an important rebuttal witness. (Pet. at 12-c to 14-c.) He claims that the investigating  
 17 agent had the address of Rohena but refused to turn over the address so he was unable to subpoena  
 18 Mr. Rohena. (Id.) Mr. Rohena's statement would have impeached the victim's credibility by  
 19 bringing up her sexual reputation. (Id.)

20       At the September 29, 2003 pretrial discovery hearing, the court ordered that the "names,  
 21 addresses and telephone numbers of all persons who were contacted with respect to this case by  
 22 agents of the police whether or not those individuals provided information which the people thought  
 23 was relevant, . . ." be provided to Petitioner. (RT at 303.) On November 25, 2003, during trial,  
 24 when Petitioner sought to have Robert Rohena be a witness on the stand, the prosecution stated that  
 25 they had found him, and interviewed him but that was the last contact they had with him. (RT at  
 26 1486.) The prosecution could not remember where he was working. (Id.) The trial judge suggested  
 27 that Petitioner and the prosecution discuss stipulating to parts of his interview and to work on  
 28 locating the witness. (Id. at 1487-88.) Rohena did not testify at the trial. Petitioner argues that the

1 trial judge could have ordered the prosecutor's investigating agent to locate the address of Rohena  
 2 because he was highly important to impeach the victims' testimony.

3 In response to Petitioner's request to add this claim on appeal, appellate counsel explained  
 4 that any information of the victim's sex reputation was properly excluded at trial and he did not see  
 5 any issue as to the court's ruling. (Pet., Ex. E.)

6 In addition, even if appellate counsel failed to challenge the ruling of the state court, the  
 7 result of the proceeding would not have been different. Looking at the witness statement, Rohena  
 8 would not have been a favorable witness to Petitioner. (Pet., Ex. R.) First, in a voicemail to the  
 9 police, Rohena indicated he did not want to be involved in court regarding a case about "he said she  
 10 said thing when they are both wrong." (*Id.*) Rohena also stated that Petitioner did not keep normal  
 11 hours, drove one of Rohena's roommates, who was also a friend, out and expressed distrust in  
 12 Petitioner regarding Rohena's possessions in the room they shared. (*Id.*) In addition, if Rohena had  
 13 testified, it would have not helped Petitioner's case because the sex reputation of the victim was  
 14 excluded from trial. (See RT at 787-792.) Therefore, appellate counsel's decision not to challenge  
 15 the court's ruling was reasonable and not a basis for habeas relief. See Babbitt, 151 F.3d at 1170.

16 **5. Failure to Investigate Newly Discovered Exculpatory Evidence in Support of a  
 17 Habeas Petition or To Assist in Filing a Petition regarding Dixon's Declaration**

18 Petitioner argues that in September 2004, he discovered a man by the name of Richard Dixon  
 19 who recalled being present in the area on the night in question and who provided a declaration about  
 20 the victim's "bizarre sexual activities." (Pet. at 16-c.) Petitioner claims he brought this information  
 21 to his appellate counsel who refused to investigate the matter or file a petition for writ of habeas  
 22 corpus. In the letter dated November 18, 2004, appellate counsel explained that after reviewing the  
 23 information provided by Petitioner, counsel did not see how Dixon's declaration would provide a  
 24 basis for relief because the declaration fails to state why he was not called as a witness during the  
 25 trial and any information about the victim's reputation evidence regarding trading drugs for sex was  
 26 properly excluded by the trial court. Petitioner has not provided any authority that appellate  
 27 counsel's reasoning is invalid. Accordingly, Petitioner has not overcome the presumption of  
 28 competency with this issue.

1       Based on the above, the Court concludes that after a *de novo* review of the record, Petitioner  
2 has not shown that appellate counsel provided ineffective assistance of counsel.

3 | F. Certificate of Appealability

4 Rule 11 of the Federal Rules Governing Section 2254 Cases, “[t]he district court must issue  
5 or deny a certificate of appealability when it enters a final order adverse to the applicant.” A  
6 certificate of appealability should be issued only where the petition presents “a substantial showing  
7 of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A certificate of appealability  
8 “should issue when the prisoner shows . . . that jurists of reason would find it debatable whether the  
9 petition states a valid claim of the denial of a constitutional right and that jurists of reason would  
10 find it debatable whether the district court was correct in its procedural ruling.” Slack v. McDaniel,  
11 529 U.S. 473, 484 (2000).

12       Based on the Court’s review of the petition, the Court finds no issues are debatable among  
13 jurists of reason and that no jurists of reason would find it debatable whether the district court was  
14 correct in its procedural ruling. See Slack, 529 U.S. at 484. Accordingly, a certificate of  
15 appealability is DENIED as to the claims in the petition.

## Conclusion

17 For the reasons set forth above, IT IS HEREBY ORDERED that the Court **ADOPTS** the  
18 report and recommendation of the Magistrate Judge in its entirety; and **DENIES** the petition for writ  
19 of habeas corpus. The Court also **DENIES** a certificate of appealability and **DENIES** Petitioner's  
20 motion for ruling on pending objection pleading as **MOOT**. The Court further **DENIES**  
21 Petitioner's motion to appoint counsel and/or discovery process as **MOOT**.

22 || IT IS SO ORDERED.

24 || DATED: June 28, 2011

Hon. Anthony J. Battaglia  
U.S. District Judge